The Bill of Complaint does not allege that the Secretary of the Interior has obtained a permit from the State Water Commissioner to appropriate the water which he proposes to divert at Parker Dam.

Article I of Chapter 81, Revised Code of Arizona, 1928, embodies the State Water Code, under the provisions of which it is required that a permit must be obtained from the State Water Commissioner before any water is appropriated.

Section 3315 makes it a misdemeanor for any person to "without authority divert water from a stream."

The Act of Congress of June 17, 1902 (c. 1093, Sec. 8, 32 Stat. 390), U. S. C. A. 383, Title 43, reads as follows:

> "Section 383. **Vested rights and State laws unaffected by chapter.** Nothing in this chapter (Reclamation Law), shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interestate stream or the waters thereof."

In *Burley v. United States*, 179 Fed. 1 (C. C. A. 9), it was held that the foregoing section not only recognizes the constitution and laws of the state providing for the

appropriation of its waters and the reclamation of its arid lands, but that it requires the Secretary of the Interior in carrying out the provisions of the Reclamation Law to proceed in conformity with the laws of the state regulating the appropriation of water.

In the recent case of *In re Determination of Relative Rights to Use of Waters of Pantano Creek in Pima County, Tattersfield v. Putman*, 41 Pac. (2d) 228, decided by the Supreme Court of Arizona, February 11, 1935, which was not available at the time Arizona's Motion to Dismiss and supporting brief were prepared, it was held that after the adoption of the Water Code, supra, in 1919,

> "it was no longer possible to appropriate water under the law of Arizona for the purpose of irrigation by its mere beneficial user for that purpose upon land. Certain formalities were required to initiate and perfect the right. It does not appear from the record that these formalities were ever complied with so far as the Monthan land was concerned. We are therefore of the opinion that no right to the use of water for that land has ever been legally acquired by any one."

Included among the formalities required are an application by the proposed appropriator and the granting of a permit to divert and appropriate water by the State Water Commissioner.

Prior to this decision, it had been the general opinion of the profession in Arizona that an appropriation could

be lawfully made in this State by actual diversion and beneficial use, notwithstanding the provisions of the Water Code; that the only advantage which could accrue by a compliance with the provisions of the Water Code would be the benefit of the doctrine of relation, which would fix the date of the priority as of the date of the filing of the application for a permit to appropriate, instead of as of the date of actual diversion of the water and its application for a beneficial use.

If the United States is proceeding under the Reclamation Law, it is required by the provisions of the Act of Congress of June 17, 1902, supra, to proceed in conformity with the State Water Code, all the formalities of which, in turn, must be complied with before a legal right to appropriate and divert water can be obtained by any person, including the Government. We, therefore, advance the proposition that the State of Arizona was acting within the scope of its legal rights when it forcibly prevented the Secretary of the Interior from diverting water from the Colorado River for the irrigation of public and Indian lands, independently of its right to repel the trespass upon its fee at the site of the Dam and within the flood lines of the Reservoir, and to prevent an unlawful obstruction to navigation by the Secretary of the Interior while acting as the agent and contractor of The Metropolitan Water District.

III.

THE UNITED STATES CAN ASSERT NO RIGHTS TO BUILD DAM UNDER PARAGRAPH 7, SEC-

TION 20 OF THE ACT ADMITTING ARIZONA AS A STATE.

On page 25 of the Government's brief it cites and quotes from *Stearns v. Minnesota*, 179 U. S. 223, 45 Law Ed. 162, where the court makes a distinction between attempted compacts in enabling acts relating (a) to political rights and obligations of the new state, and (b) to property belonging to the United States or to the anticipated new state. The court points out that the former can not be restricted by compact, while the latter is a proper subject of contract between the Federal Government and the new state.

The Government takes the position that the reservation in the Arizona Enabling Act to the effect that the Government may carry out the terms of the Reclamation Law as fully as though Arizona had continued to be a territory, had to do with property rights and not with political rights and obligations.

The provision in the Minnesota Enabling Act considered in the Stearns case was one by which the Federal Government, by an Act of Congress, donated to the state of Minnesota large areas of the public domain, subject to certain restrictions with reference to disposition and taxation. The Federal Government owning the public domain in fee in its proprietary capacity, had a perfect right to either withhold or donate the lands to Minnesota, and if donated, to attach whatever conditions it fancied, and Minnesota only obtained such title as the Act of Congress bestowed upon it.

On the other hand, the Federal Government, owned the waters, beds and banks of navigable streams prior to statehood in its sovereign capacity in trust for the use and benefit of future states, if, as and when created, and title thereto vests in the new states by the mere fact of succeeding to the sovereignty of the Federal Government. *Pollard, et al, v. Hagan, et al,* 3 Howard 212, 11 Law Ed. 565.

The waters, beds and banks of navigable rivers do not pass from the Federal Government to a new state by grant, but as an attribute of sovereignty.

The Act admitting Alabama as a state contained a provision to the effect that upon admission, the people of Alabama disclaimed all right or title to the waste or unappropriated lands lying within the state, and that the same should remain at the sole disposal of the United States.

Pollard v. Hagan, supra, was a suit in ejectment, involving the title to land between the high and low water lines of the Mobile River, a navigable stream, the plaintiff claiming under a patent from the United States and an Act of Congress confirming the same, and the defendant claiming under a patent from the state of Alabama. No question was raised as to whether or no the land involved fell within the broad definition of "waste and unappropriated lands", which were reserved to the United States in the Enabling Act. It was held that Congress was without authority to reserve to the United States title to the land in question. The opinion concludes with the following language:

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprived the States of the power to exersice a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, 'and the laws which shall be made in pursuance thereof.'

"By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Third. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

If Congress, in providing for the admission of a new state, cannot reserve the fee to the bed and banks of navigable streams, we know of no principle of law which will permit it to reserve a lesser estate in the nature of an easement.

We wish again to state that Arizona does not question the general power of Congress to reclaim, by irrigation or otherwise, public and Indian lands, but we do earnestly question its right to appropriate to its own use the bed and banks of the Colorado River, the property of Arizona held in its sovereign capacity, without the state's consent, for any purpose whatsoever, other than the primary one of improving navigation, while acting in its governmental, as distinguished from its proprietary capacity.

While Congress has the power to pay off the national debt, it has not the constitutional authority to appropriate one acre of land of the state of Arizona for that purpose without the state's consent, although it might be sufficient to discharge in full every obligation owed by the Federal government. The same principle applies to appropriating property of the state to its own use in aid of reclamation of public and Indian lands.

The Government also makes the point that Section 9 of the Rivers and Harbors Appropriation Act of 1899 (c. 425, 30 Stat. 1151), prohibiting the construction of any dam across a navigable stream without the consent of Congress, has no application to a dam being built by the Government itself. We concede this point so far as it applies to a dam being built under authority of Con-

gress, pursuant to the commerce clause of the Constitution for the purpose of improving navigation. However, that it not the situation presented by this case.

Here the Government is acting as a contractor *for profit* for The Metropolitan Water District of Southern California and no Government funds are being expended. While it is true that the Government's profit does not accrue in dollars and cents, the contract provides that it shall receive (really for the mere use of its name) title to the dam, estimated to cost $13,000,000, and the free use of 42,500 firm continuous hydro-electric power of a present capitalized estimated switch-board value of some $12,000,000, making a total profit of $25,000,000 for acting as a buffer between the Water District on one hand and the State of Arizona and the Congress of the United States on the other.

The Secretary of the Interior, acting for his principal, The Metropolitan Water District, in the construction of the dam, must necessarily show the authority of the principal to do that which the Secretary has undertaken to do for and on its behalf. It would seem that the contractor's rights and authority in the premises would not be greater than those of his principal.

The Government makes the further point that Section 202 of the National Industrial Recovery Act authorizes the Administrator of Public Works to adopt a comprehensive plan of public works, including river and harbor improvements, the latter being subject to the approval

of Congress or the Chief of Engineers of the Army; that the Administrator has included Parker Dam in his program of public works, and that the same has been approved by the Chief of Engineers and the Secretary of War.

We submit that said Section 202 only contemplated public works being constructed from funds appropriated by Congress, and that no bridge, dam or dike can lawfully be built in, upon or across a navigable stream by the Public Works Administrator, even with funds appropriated by Congress, without an approving Act of Congress; the approval of the Chief of Engineers and the Secretary of War not being sufficient for such structures. It was never contemplated by said section that a corporation or individual might circumvent the laws of Congress, obstruct navigation, and appropriate to its own use the beds and banks of a navigable stream without the state's consent simply by procuring the Secretary of the Interior as a contractor to construct the works; and this regardless of whatever profit, direct or indirect, tangible or intangible, that might accrue to the United States as a contractor.

The Government makes the further point that inasmuch as the bill alleges that the dam will improve navigation, the motion to dismiss admits that allegation to be a fact. The motion to dismiss is addressed to the entire bill, which we submit negatives the allegations of river improvement. The bill contains something in the

nature of a negative pregnant. While both the bill and the Government's brief contain lip service to navigation, the undisputed allegations in the bill that the dam across the river will be 72 feet high and extend from bank to bank and the express provisions of the contract requiring the water in the reservoir to be maintained at an elevation of 450 feet above sea level (the crest of the dam) all negative the allegations and argument directed to the improvement of navigation, flood control and the reregulation of the discharge of water from Boulder Dam.

Respectfully submitted,

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